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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1938

No. 302

FELT AND TARRANT MANUFACTURING COMPANY, a corporation,
Appellant,

vs.

JOHN C. CORBETT, FRED E. STEWART, RICHARD E. COLLINS, RAY L. EDGAR, and HARRY B. RILEY, as members of the State Board of Equalization of the State of California; STATE BOARD OF EQUALIZATION OF THE STATE OF CALIFORNIA, and U. S. WEBB, the ATTORNEY GENERAL OF THE STATE OF CALIFORNIA,
Appellees.

BRIEF OF APPELLEES

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SUBJECT INDEX

TABLE OF AUTHORITIES CITED

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STATEMENT OF THE CASE

(a) Questions Involved

Appellees object to the appellant's statement of the questions involved herein on the ground that the statement embodies conclusions of law, namely, the conclusions that appellant is not subject to the state's jurisdiction and that appellant is required to

pay a tax to the state. Appellees would state the basic issue as follows:

> Can the state constitutionally require a foreign corporation, engaged in interstate commerce within its boundaries, to collect from its purchasers a tax imposed upon such purchasers with respect to the storage, use or other consumption in the state of tangible personal property upon the termination of the interstate transit of the property and to remit to the state the amount collected?

(b) Appellant's Operations

In addition to the appellant's statement of its operations, appellees wish to direct the court's attention to the following matters set forth in the Bill of Complaint:

(1) Appellant employs two general agents in the State of California who devote their entire time to its business affairs. (R. 4, 26.)

(2) Appellant leases two offices in the state, paying the rentals thereof, for the conduct of business on its behalf by its agents, such offices being the headquarters of the agents and their subagents for the conduct of that business. (R. 5.)

(3) Appellant compensates its general agents through the payment of commissions and contributes certain amounts toward the expenses of the general agents and subagents and the salaries of demonstrators. (R. 5, 24, 25.)

(4) "In some instances the machines are shipped directly to the customers, while in other instances, in order to secure reduced freight rates, large groups of machines are shipped to the general agents who make delivery to the various purchasers." (R. 5.)

(5) Appellant supplies machines to its general agents in California for use as demonstrators, samples, repair loans, trials and such other uses as may be authorized from time to time by it. (R. 6, 26.)

ARGUMENT

I

The State Can Constitutionally Require the Appellant to Collect the Tax From Its Purchasers and to Remit the Amount Collected to the State.

It should be observed at the outset that the California Use Tax Act imposes a tax upon consumers of tangible personal property with respect to their storage, use or other consumption of the property and does not impose a tax upon the seller of the property. Section 3 of the act provides as follows:

> "SEC. 3. An excise tax is hereby imposed on the storage, use or other consumption in this State of tangible personal property purchased from a retailer on or after July 1, 1935, for storage, use or other consumption in this State at the rate of three per cent of the sales price of such property.
>
> "Every person storing, using or otherwise consuming in this State tangible personal prop-

erty purchased from a retailer shall be liable for the tax imposed by this act, and the liability shall not be extinguished until the tax has been paid to this State; provided, however, that a receipt from a retailer maintaining a place of business in this State or a retailer authorized by the board, under such rules and regulations as it may prescribe, to collect the tax imposed hereby and who shall for the purposes of this act be regarded as a retailer maintaining a place of business in this State, given to the purchaser in accordance with the provisions of section 6 hereof, shall be sufficient to relieve the purchaser from further liability for the tax to which such receipt may refer."

Pursuant to the act, the tax is administered by the State Board of Equalization as a tax upon consumers and not upon sellers. Thus, the board's Use Tax Ruling No. 4 provides as follows:

"PAYMENT OF TAX BY PURCHASERS

"Purchasers of tangible personal property, the storage, use or other consumption of which is subject to the tax, must pay the tax:

"(1) to the person from whom such property is purchased if such person holds a permit to engage in business as a retailer under the California Retail Sales Tax Act or a certificate of authority to collect tax under the California Use Tax Act; or

"(2) directly to the board if the person from whom the tangible personal property is purchased does not hold a permit to en-

gage in business as a retailer under the California Retail Sales Tax Act or a certificate of authority to collect tax under the California Use Tax Act.

"Purchasers should not pay the tax to a person who does not hold a retailer's permit or a certificate of authority to collect tax. Purchasers will be liable for payment of the tax to the board unless receipts, as provided in Ruling No. 7, are obtained from sellers holding a retailer's permit or a certificate of authority to collect tax as provided above."

Use Tax Ruling No. 7, referred to in the ruling just quoted, provides as follows:

"RECEIPTS FOR PAYMENT OF TAX TO RETAILERS

"Each retailer required or authorized to collect use tax from purchasers must give a receipt to each purchaser for the amount of tax collected. The receipt need not be in any particular form but must show the following:

"(1) The name and place of business of the retailer.

"(2) The serial number of the retailer's permit to engage in business as a retailer or the serial number of the retailer's certificate of authority to collect use tax.

"(3) The name and address of the purchaser.

"(4) A description identifying the property sold to the purchaser.

"(5) The date on which the property was sold.

"(6) The sale price of the property.

"(7) The amount of tax collected by the retailer from the purchaser.

"A sales invoice containing the data required above, together with evidence of payment of such sales invoice, will constitute a receipt.

"Purchasers will be liable for payment of the tax to the board unless they obtain and retain for inspection receipts as herein provided."

It is clear, therefore, that the status of the appellant under the Use Tax Act is not that of a taxpayer, but merely that of a collecting agent.

It should also be observed that the validity of the tax imposed by the act upon consumers is not questioned herein. Appellant does not dispute the right of appellees to collect the tax from the consumer. (Brief of Appellant, p. 17.) In any event, that right seems clearly established by the decision of this court in *Henneford* vs. *Silas Mason Co.,* 300 U. S. 577.

The authority of the state to require the appellant to collect the use tax from its purchasers and remit the amount collected to the state is clearly established by the decision of this court in *Monamotor Oil Co.* vs. *Johnson,* 292 U. S. 86. That case involved an Iowa statute requiring all distributors to collect a tax on the use of gasoline within the state. The court rejected the contention that this requirement constituted a forbidden burden with respect to gasoline which had been shipped into

the state in interstate commerce. In the course of its opinion, at page 93, the court stated:

"There is no substance in the claim that the statutes impose a burden upon interstate commerce, contrary to the prohibition of Article I, § 8 of the Federal Constitution. The appellant insists that the tax is a direct tax on motor vehicle fuel imported. The court below concluded that the law laid an excise upon the use of fuel for the propulsion of vehicles on the highways of the state. The state officials have administered the tax on this theory. We think this the correct view. The levy is not on property but upon a specified use of property. *Altitude Oil Co.* v. *People,* 70 Colo. 452; 202 Pac. 180; *Standard Oil Co.* v. *Brodie,* 153 Ark. 114; 293 S. W. 753. It is not laid upon the importer for the privilege of importing (compare *Brown* v. *Maryland,* 12 Wheat. 419; *Bowman* v. *Continental Oil Co.,* 256 U. S. 642, 647), but falls on the local use after interstate commerce has ended. Compare *Sonneborn Bros.* v. *Cureton,* 262 U. S. 506; *Nashville, C. & St. L. Ry. Co.* v. *Wallace,* 288 U. S. 249; *Edelman* v. *Boeing Air Transport, Inc.,* 289 U. S. 249. The statute in terms imposes the tax on motor vehicle fuel used or otherwise disposed of in the state. Instead of collecting the tax from the user through its own officers, the state makes the distributor its agent for that purpose. This is a common and entirely lawful arrangement. *Citizens National Bank* v. *Kentucky,* 217 U. S. 443, 454; *Pierce Oil Corp.* v. *Hopkins,* 264 U. S. 137; *Standard Oil Co.* v. *Brodie, supra; Standard Oil Co.* v. *Jones,* 48 S. D. 482; 205 N. W. 72."

Having determined that the tax was a valid charge upon the use of gasoline within the state and that the state could constitutionally require the sellers of gasoline to collect that tax from their purchasers, the court held that this requirement could be enforced even though the gasoline with respect to which the tax was imposed was shipped into the state in interstate commerce. In this connection, at page 94, the court said:

> "The appellant, however, says that the state officials have required it to report and to pay tax on shipments made from Oklahoma direct to dealers in Iowa who are appellant's customers, and that in respect of such transactions the burden on interstate commerce is obvious. But if the gasoline so imported is intended to be used in Iowa for motor vehicle fuel it is subject to the tax. If it is not so used by the appellant's customer, or by the purchaser at retail, either may obtain a refund of the tax collected by the appellant and remitted to the state. The statute obviously was not intended to reach transactions in interstate commerce, but to tax the use of motor fuel after it had come to rest in Iowa, and the requirement that the appellant as the shipper into Iowa shall, as agent of the state, report and pay the tax on the gasoline thus coming into the state for use by others on whom the tax falls imposes no unconstitutional burden either upon interstate commerce or upon the appellant."

There is ample precedent for the imposition of the duty to collect a tax upon one who was con-

stitutionally exempt from the tax. See, in this connection, the cases holding that a state may require a national bank to collect a tax on shareholders which could not have been imposed upon the bank.

National Bank vs. *Commonwealth,* 9 Wall. (76 U. S.) 353;
Aberdeen Bank vs. *Chehalis County,* 166 U. S. 440;
Merchants' and Manufacturers' Bank vs. *Penn,* 167 U. S. 461;
Home Savings Bank vs. *Des Moines,* 205 U. S. 503.

See also *Pierce Oil Co.* vs. *Hopkins County,* 264 U. S. 137, holding that a state statute requiring sellers of gasoline to collect a tax from their purchasers did not violate due process; and

Iowa vs. *Standard Oil Co.,* ---- Iowa ----, 271 N. W. 185;
Iowa vs. *Phillips Petroleum Co.,* ---- Iowa ---, 271 N. W. 192.

(Appeal dismissed for want of substantial Federal question, 302 U. S. 646; involving the same statute under consideration in the *Monamotor* case)

Appellant attempts to distinguish the *Monamotor* case on the ground that the seller in that case was engaged in both intrastate and interstate commerce, whereas appellant is engaged solely in interstate commerce. Assuming, for the purpose of argument, that the appellant is engaged exclusively

in interstate commerce it is difficult to see why the rule of the *Monamotor* case should be any the less applicable. Certainly, the burden assertedly imposed on interstate commerce is no greater in one case than in the other and, accordingly, if there is no prohibited burden in the one case, there is none in the other. Thus, the obligation imposed upon the appellant to collect the tax with respect to its interstate shipments of tangible personal property is no greater than the obligation imposed upon the Monamotor Oil Company to collect a tax with respect to its interstate shipments of gasoline. The fact that the Monamotor Oil Company transacted some intrastate business in Iowa is just as irrelevant, so far as the commerce clause is concerned, as would be the fact that it transacted intrastate business in some other state. It is clear, therefore, that if the requirement that appellant collect the tax be invalid, it can not be so because of the commerce clause.

It is equally clear, however, that this requirement does not violate the Fourteenth Amendment. There can be no doubt about appellant's being within the jurisdiction of the state as the service of process cases so convincingly demonstrate. Thus, in *International Harvester Company of America* vs. *Kentucky*, 234 U. S. 579, at page 585 the court said:

> "Here was a continuous course of business in the solicitation of orders which were sent to another State and in response to which the

machines of the Harvester Company were delivered within the State of Kentucky. This was a course of business, not a single transaction. The agents not only solicited such orders in Kentucky, but might there receive payment in money, checks or drafts. They might take notes of customers, which notes were made payable, and doubtless were collected, at any bank in Kentucky. This course of conduct of authorized agents within the State in our judgment constituted a doing of business there in such wise that the Harvester Company might be fairly said to have been there, doing business, and amenable to the process of the courts of the State."

So, also, the course of conduct of appellant's authorized agents within the state, as set forth at the opening of this brief, constituted a doing of business there in such wise that appellant might be fairly said to have been there, doing business and amenable to the process of the courts of the state.

At page 587 of its opinion in the *International Harvester* case, the court said:

"It is argued that a corporation engaged in purely interstate commerce within a State cannot be required to submit to regulations such as designating an agent upon whom process may be served as a condition of doing such business, and that as such requirement cannot be made the ordinary agents of the corporation, although doing interstate business within the State, can-

not by its laws be made amenable to judicial process within the State. The contention comes to this, so long as a foreign corporation engages in interstate commerce only it is immune from the service of process under the laws of the State in which it is carrying on such business. This is indeed, as was said by the Court of Appeals of Kentucky, a novel proposition, and we are unable to find a decision to support it, nor has one been called to our attention.

"True, it has been held time and again that a State cannot burden interstate commerce or pass laws which amount to the regulation of such commerce; but this is a long way from holding that the ordinary process of the courts may not reach corporations carrying on business within the State which is wholly of an interstate commerce character. Such corporations are within the State, receiving the protection of its laws, and may, and often do, have large properties located within the State. In *Davis* v. *Cleveland, C., C. & St. L. Ry.*, 217 U. S. 157, this court held that cars engaged in interstate commerce and credits due for interstate transportation are not immune from seizure under the laws of the State regulating garnishment and attachment because of their connection with interstate commerce, and it was recognized that the States may pass laws enforcing the rights of citizens which affect interstate commerce but fall short of regulating such commerce in the sense in which the Constitution gives sole jurisdiction to Congress, citing *Sherlock* v. *Alling*, 93 U. S. 99, 103; *Johnson* v. *Chicago & Pacific Elevator Co.*, 119

U. S. 388; *Kidd* v. *Pearson,* 128 U. S. 1, 23; *Pennsylvania R. R. Co.* v. *Hughes,* 191 U. S. 477; and *The Winnebago,* 205 U. S. 354, 362, in which this court sustained a lien under the laws of Michigan on a vessel designed to be used in both foreign and domestic trade."

In *Natural Gas Pipeline Company Co. of America* vs. *Slattery,* 302 U. S. 300, the court held that an Illinois statute giving the State Commerce Commission the right to require information from affiliated interests of public utilities was not unconstitutional as respects a foreign corporation engaged exclusively in interstate commerce. In the course of its opinion, at page 306, the court said:

"We can find in the commerce clause and the Fourteenth Amendment no basis for saying that any person is immune from giving information appropriate to a legislative or judicial inquiry. A foreign corporation engaged exclusively in interstate commerce within the state is amenable to process there as are citizens and corporations engaged in local business. *International Harvester Company* v. *Kentucky,* 234 U. S. 579. It is similarly subject to garnishment and writ of attachment. *Davis* v. *Cleveland, Cincinnati, Chicago & St. Louis Ry. Co.,* 217 U. S. 157. It can be deemed to be no less subject, on command of a state tribunal, to the duty to give information appropriate to an inquiry pending there. The present investigation is not a regulation of interstate commerce and it burdens the commerce no more than the obligation owed by

all, even those engaged in interstate commerce, to comply with local laws and ordinances, which do not impede the free flow of commerce, where Congress has not acted."

Likewise the requirement in issue in this case does not "impede the free flow of commerce." *Monamotor Oil Co.* vs. *Johnson, supra.*

II

Appellant Is Not Entitled to an Injunction Restraining Appellees From Enforcing the Provisions of the Use Tax Act Against It

The exact nature of the argument appearing under Point III of appellant's brief, pages 34-37, is not entirely clear. In view of the citation of *Graves* vs. *Texas Co.,* 298 U. S. 393, and *Truax* vs. *Corrigan,* 257 U. S. 312, appellees believe that appellant is seeking to establish thereunder merely that appellant is entitled to an injunction as a matter of remedy, if it be determined by the court that the state is without authority to require it to collect the tax from its purchasers and remit the amount collected to the state. Appellees do not question herein the availability to appellant of the remedy of injunction, if its position as to the invalidity of the Use Tax Act as applied to it be found correct.

The case of *National Ice & Cold Storage Co.* vs. *Pacific Fruit Express Co.,* 95 Cal. Dec. 442, 79 Pac. (2d) 380, cited at page 36 of appellant's brief offers no support to appellant. In that case, the court merely determined that the state was without au-

thority to require a purchaser to reimburse his seller for the amount of retail sales tax which the seller was required to pay to the state with respect to sales made after the effective date of the Retail Sales Tax Act pursuant to contracts executed before that date which did not provide for the payment of such reimbursement. The court's conclusion was based upon the fact that the retail sales tax was imposed upon the seller and not upon the purchaser, a matter which distinguishes that case from the one at bar, the use tax being imposed directly upon the purchaser.

The remaining cases cited under Point III by appellant relate merely to the question of the jurisdiction of the state over the appellant, a matter already discussed by appellees herein and further discussion of which is believed to be unnecessary.

Appellant lists the various administrative provisions for the enforcement of the Use Tax Act, but the propriety of these provisions as applied to a person within the jurisdiction of the state is not questioned by appellant. Unless, accordingly, this court determine that the state is without authority to require appellant to collect the tax and remit the amount collected to the state or that appellant is without the jurisdiction of the state, there is no occasion to pass upon the propriety of these provisions.

CONCLUSION

For the reasons hereinabove set forth the decree of the court below, dismissing the bill and the application for interlocutory injunction and vacating the temporary restraining order, was proper and should be affirmed.

Respectfully submitted.

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